

Incidential Letter to Mr. Jeffords

## U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR  
WASHINGTON, D.C.

December 12, 1985

For Clearance

The Honorable Augustus F. Hawkins  
 Chairman  
 Committee on Education and Labor  
 House of Representatives  
 Washington, DC 20515

Dear Mr. Chairman:

I am writing to convey the ~~Administration's position on~~ views of the Department of Labor polygraph legislation currently pending before the Congress.

We support the enactment of legislation which prohibits private sector use of polygraph examinations, recognizing that some limited exemptions will be enacted by Congress. In this regard, we are concerned about potential abuses or misuses of polygraphs in these situations. Thus, the Department of Labor urges that any federal legislation address both a ban and standards so as to protect all workers.

Both H.R. 1524 and S. 1815 would establish such a ban. Although the bills do not differ greatly in their approach to prohibiting polygraph tests, we believe that the provisions of the Senate bill, rather than those of H.R. 1524, would create more effective procedures to accomplish this objective.

While we do understand the legitimate need to grant exemptions to such a ban in certain areas, we express concern that such "fixed" exemptions will continue to allow for polygraphs to be misused. We would like to see a means established for these exemptions to be reevaluated, as well as for the consideration of others.

Further, we strongly believe that as long as there are polygraph examinations administered, all workers in any exempted industry, should be protected from polygraph misuse and abuse. To meet this goal, we would like to see standards and limitations set for the uses of the polygraph, as well as for the examiners themselves. ~~(In this regard, other draft legislative proposals such as H.R. 3916, provide worthwhile guidance as to how such Federal standards might be crafted.)~~

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Regarding the bills' enforcement provisions, we believe that incorporating the remedies, penalties and procedures of the Fair Labor Standards Act (FLSA), as provided in S. 1815, would establish for the Department of Labor and for aggrieved employees or prospective employees, effective and workable remedies for any violation of the prohibitions set out in the bill. These would consist of remedies, penalties and procedures provided in sections 11(b), 16 and 17 of the FLSA, which include a civil action by the Secretary of Labor or the aggrieved employee for back wages and liquidated damages, equitable relief, administrative procedures providing for civil money penalties, and possible criminal penalties. We believe that the FLSA enforcement procedures have provided an effective pattern of enforcement for violations of the FLSA and could be adapted, without difficulty, to violations of prohibitions against use of polygraph tests.

While we believe that the incorporation of FLSA remedies for prohibited use of the polygraph is accomplished by the language of section 7 of the Senate bill, in order to allay any doubts that the civil penalty procedures of section 16(e) of the FLSA are available for enforcement purposes, we would suggest that the following sentence be added at the end of section 7: "Violations of the provisions of this Act shall also be deemed to be violations of section 12 of the Fair Labor Standards Act (29 U.S.C. 212) for the purpose of assessment and collection of civil penalties." We would also suggest that an anti-retaliation provision be specifically included, as well as a reference to the statute of limitations provision of the Portal-to-Portal Act, which is applicable to the FLSA.

Although both bills have provisions for the Secretary of Labor to prepare and print a "notice of protection" for the workplace, which would state that lie-detector tests are prohibited, only H.R. 1524 would require the Secretary of Labor to "distribute" such notices of protection. The Department currently prints certain notices and makes them available for use in places of employment, but does not distribute such notices. To require the Department of Labor to distribute such notices would be extremely costly and could raise legal issues, such as those pertaining to possible legal defenses to non-compliance in situations where posters were not received.

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The Department of Labor desires to work with the House and Senate Committees to provide advice both on enforcement and privacy concerns with regard to the use of the polygraph in the workplace so as to fashion a workable, reasonable federal solution that protects all workers, as well as the legitimate needs of employers.

Very truly yours,